[Filed August 27, 1999]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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DOSSEY DOUGLAS,

Plaintiff,

v.

THE STATE OF CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,

Defendant.

NO. CIV. S-98-1281 WBS PAN

MEMORANDUM AND ORDER

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The California Youth Authority ("defendant" or "CYA") moves for summary judgment on the grounds that plaintiff Dossey Douglas did not timely file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") as required for his claim of a violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§12101 et seq., and did not timely file this action claiming a

violation of Section 504 of the federal Rehabilitation Act of 1973, 29 U.S.C. § 794.

On March 1, 1996, the CYA notified plaintiff that he was rejected for employment as a Group Supervisor, because he was unable to meet the color vision standards for the Group Supervisor position. Plaintiff pursued internal grievance procedures, filing an internal complaint of discrimination with the CYA's Equal Employment Office and appealing the CYA's decision to the California State Personnel Board. On April 18, 1997, plaintiff filed a charge of discrimination with the EEOC. On May 7, 1998, the EEOC issued to plaintiff a "right-to-sue" letter. Plaintiff filed this action within 90 days of receipt of the letter, on July 6, 1998.

The ADA requires that plaintiff exhaust his administrative remedies by filing a charge of discrimination with the EEOC within 180 days after the alleged unlawful employment practice occurred, or, where plaintiff has initially

instituted proceedings with the appropriate state agency, within 300 days after the alleged unlawful employment practice occurred. 42 U.S.C. §§ 12117(a), 2000e-5(e)(1). In this case, the EEOC referred the charge to the California Department of Fair Employment and Housing, which means that the 300-day limitations period applies to the ADA claim. See EEOC v. Commercial Office Products Co., 486 U.S. 107, 111, 108 S. Ct. 1666, 1668, 100 L. Ed. 2d 96 (1988); see also Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 439 (4th Cir. 1998). Plaintiff filed his EEOC charge over 300 days after learning on March 1, 1996 that he was rejected from employment on the basis of his color-vision impairment.

In California, an action for a violation of Section 504 of the Rehabilitation Act must be filed within the one-year period of limitations.[1/] Plaintiff filed suit over two years after

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1. Because Section 504 of the Rehabilitation Act does not expressly provide a statue of limitations, courts borrow the most appropriate state time limitations. Alexopulos v. San Francisco Unified School District, 817 F.2d 551, 554 (9th Cir. 1987). A majority of the courts have held that the statue of

being notified that CYA rejected him from employment on the basis of his color-vision impairment.

Plaintiff argues, however, that the CYA has continuously maintained its allegedly discrimination policy before and during the limitations periods for his ADA and Rehabilitations Act claims and that the policy continues to this day. He contends that the CYA thus engaged in a continuous violation, such that his claims are not time-barred.

Under the continuing violation doctrine, events occurring outside the limitations period may be considered as

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limitations applicable to an action pursuant to Section 504 of the Rehabilitation Act is the state's personal injury statute of limitations. Independent Housing Services of San Francisco v. Fillmore Center Associates, 840 F. Supp. 1328, 1345 (N.D. Cal. 1993); Scott M. Smith, What Statute of Limitations Applies in Actions Under § 504 of Rehabilitation Act of 1973, 120 ALR Fed § 621. In California, the period of limitations in a personal injury case is one year. Cal. Code of Civ. Pro. § 340 (3); Independent Housing Services, 840 F. Supp. at 1345.

Even under the minority view, that the most analogous statute of limitations is that of the state statute prohibiting discrimination on the basis of disability, Wolsky v. Medical College of Hampton Roads, 1 F.3d 222 (4th Cir. 1993), the period of limitations in California would still be one year. See Cal. Gov't Code § 12960.

a basis for the claim so long as those events are part of an on-going unlawful employment practice. Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1107 (9th Cir. 1998). To establish a continuing violation, plaintiff must show a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system which operates against the plaintiff both before and during the limitations period. Green v. Los Angeles County Super. of Sch., 883 F.2d 1472, 1480 (9th Cir. 1989). However, the continuing violation doctrine only applies if a violation occurred within the limitations period; the mere persistence if discriminatory effects does not suffice. See United Airlines, Inc. v. Evans, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889, 52 L. Ed. 2d 571 (1977) ("But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists").

The maintenance of an allegedly discriminatory policy is not sufficient to trigger the continuing violations doctrine;

plaintiff must also show that the policy was applied to him during the limitations period. As the court stated in Sandoval v. Saticoy Lemon Ass'n, 747 F. Supp. 1373 (C.D. Cal. 1990):

> In order to avoid exposing an employer to an open-ended period of liability, it is appropriate that a plaintiff show some application of the illegal policy to him within the [limitations period]. "If mere existence of a policy is sufficient to constitute a continuing violation, it is difficult to conceive of a circumstance in which a plaintiff's claim of an unlawful employment policy could be untimely."

Id. at 1386 (quoting Abrams v. Baylor College of Medicine, 805 F.2d 528, 533 (5th Cir. 1986).

Plaintiff contends that the court may also consider events that occurred after the limitations period, and indeed after the filing of the lawsuit, for the purpose of deciding whether a continuing violation exists. Plaintiff's position, however, conflates two separate inquiries: (1) whether there is a continuing violation, such that a valid claim exists; and (2) assuming a valid claim exists, whether the scope of the claim may extend to provide relief for post-filing events. That the scope of the relief may in some cases extend to compensate

for discrimination occurring after filing of the lawsuit does not negate the fact that the continuing violation doctrine requires that at least one violation occur during the limitations period.

Domingo v. New England Fish Co., 727 F.2d 1429, 1444 (9th Cir. 1984), and Chung v. Pomona Valley Community Hospital, 667 F.2d 788, 792 (9th Cir. 1982), are cited by plaintiff for the proposition that the court may consider events occurring subsequent to the filing of the complaint. These cases concern the second inquiry. In Domingo, the scope of the relief afforded plaintiffs was held to encompass relief for discrimination suffered after the filing of the lawsuit. Domingo, 727 F.2d at 1444. However, the court also held that as a prerequisite to obtaining relief each class member had to demonstrate that he or she had suffered discrimination during the limitations period. Id. at 1443.

In Chung, the court noted that if plaintiff could show a pattern of discrimination, he might also show that a post-

filing event was part of the pattern. Chung, 667 F.3d at 792. In Chung, however, it is also clear that a discriminatory act occurred within the limitations period on plaintiff's Title VII claim. Id. at 790; cf. Sosa v. Hiraoka, 920 F.2d 1451, 1455-57 (9th Cir. 1990) (analyzing the scope of the court's jurisdiction over events occurring after the filing of the EEOC charge, in a case where there was a violation within the limitations period). Domingo and Chung are consistent with the requirement that plaintiff demonstrate a violation, or, in this case, an application of the discriminatory policy to him, during, rather than after, the limitations period.

Thus, for the continuing violation doctrine to apply to preserve plaintiff's ADA claim, there must have been some application of the policy to him during the 300 days prior to the filing of his EEOC charge, i.e., between June 22, 1996 and April 18, 1997. For the claim under Section 504 of the Rehabilitation Act, the relevant period during which there

must have been some application of the policy to him is July 6, 1997 to July 6, 1998.

Plaintiff argues that two events occurred which trigger the continuing violations doctrine: (1) that he re-applied for the position of Group Supervisor at the CYA and took the written examination on October 26, 1996, within the limitations period of the ADA claim; and (2) that, in the fall of 1998, he inquired whether the policy was still in effect and that the continued existence of the policy deterred him from re-applying.[2/]

Plaintiff's October 26, 1996 re-application and participation in the examination does not show that the policy was applied to him during the limitations period. Plaintiff

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2. The evidentiary basis for this second event is plaintiff's declaration, which is unfortunately incomplete regarding this event. Plaintiff's statement cuts off abruptly after: "In or about the fall of 1998, I learned that the California Youth Authority was again testing for the Group Supervisor position. I talked with one Senior Group Counsellor [sic], who is a supervisor at the DeWitt Facility about the upcoming examination. I asked if color. . . ." (Douglas Decl. ¶ 46.)

has not presented evidence that in this second round he was disqualified from employment on the basis of the color vision standard or that he was even required to take the color vision test. At oral argument, counsel for plaintiff effectively conceded that plaintiff has not been denied a position on the basis of his color-vision impairment since the CYA's March 1, 1996 decision.

Neither does plaintiff demonstrate that the policy injured him during the limitations period when he contends that he was deterred from applying for the Group Supervisor position in the fall of 1998 because the policy was still in force. This event occurred after, not during, the applicable limitations periods. Plaintiff shows only that the policy continued during this time, which is insufficient to constitute a continuing violation. See Sandoval, 747 F. Supp. at 1386.

Plaintiff cites several authorities for the proposition that being deterred from applying for a position can constitute actionable discrimination. In each of these cases, however,

the plaintiff was deterred from application during, rathe than after, the limitations period.[3/] These cases do not support plaintiff's argument that being deterred from applying for a position after the filing of litigation triggers the continuing violation doctrine.

The court finds that plaintiff has not shown an application of the policy to him within the limitations period

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3. In Gutowsky v. Placer County, 108 F.3d 256 (9th Cir.), cert. denied, 118 S. Ct. 298 (1997), plaintiff was deterred from applying for the transfer up to the day she left employment with defendant. The court held that the continuing violation occurred each day until the last day of employment, which was within the limitations period. Gutowsky, 108 F. 3d at 260.

Similarly, in Sandoval, 747 F. Supp. 1373, the violations continued throughout the period before the filing of the EEOC charge, despite the fact that one of the plaintiffs did not re-apply for a position. Id. at 1387. The discriminatory acts in question, including actively discouraging one plaintiff from applying, occurred during, not subsequent to, the limitations period. Id.

In Roberts v. North American Rockwell Corp., 650 F.2d 823, 827-28 (6th Cir. 1981), plaintiff applied continuously, and was rejected continuously, until it became futile for plaintiff to re-apply formally. As contrasted with the present case, the plaintiff in Roberts was actively discouraged from applying for employment on September 11, 1973, a date within the limitations period. Id. at 828.

and thus that he has not shown the existence of a continuous violation.[4/] Accordingly, plaintiff failed to exhaust administrative remedies on his ADA claim, because he did not timely file his EEOC charge within 300 days of March 1, 1996. Similarly, his Rehabilitation Act is time-barred because the limitations period ran as of March 1, 1997.

Plaintiff argues that the running of the limitations period on his Rehabilitation Act claim should be equitably tolled, due to his pursuit of the CYA Equal Employment Office discrimination complaint and appeal to the State Personnel Board. He contends he reasonable and in good faith pursued these remedies because, although the CYA informed him of these internal grievance procedures, it did not inform him of

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4. Indeed, to find differently would mean that any plaintiff faced with a motion to dismiss a time-barred claim could save the claim simply by inquiring about his chances of obtaining a job with defendant and then amending the complain to allege that he was discouraged from applying.

the need to file a lawsuit or an EEOC charge to preserve his legal remedies.[5/]

California's equitable tolling doctrine allows a plaintiff to toll the state statute of limitations when he or she has several formal legal remedies and reasonably and in good faith pursues one. Fobbs v. Holy Cross Health System Corp., 29 F.3d 1439, 1444 (9th Cir. 1994), cert. denied, 513 U.S. 1127 (1995). Before plaintiff may benefit from the doctrine, however, he must overcome three threshold matters: (1) the tolling doctrine must not be inconsistent with federal policy underlying the cause of action under consideration; (2) the remedy pursued by plaintiff in the first forum must address

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5. Despite plaintiff's contention that the CYA thereby misled him, he indicated at oral argument that he was not arguing that the limitations period should be tolled by equitable estoppel. In any event, plaintiff has not submitted evidence that defendant intentionally or knowingly misled him, as would be necessary to support and equitable estoppel argument. See United States v. Marolf, 173 F.3d 1213, 1218 n.3 (9th Cir. 1999); Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1050 (9th Cir.), cert. denied, 484 U.S. 986 (1987).

the same wrong as that sought to be remedies by the arguable time-barred claim; and (3) three core elements must be met - that plaintiff gave timely notice to defendant of the first claim, that defendant is not prejudiced in gathering evidence to defend against the second claim, and that plaintiff acted in good faith and with reasonable conduct in filing the second claim. Id. at 1445; cf. Estate of Blue v. County of Los Angeles, 120 F.3d 982, 984 (9th Cir. 1997) (discussing only the core elements where it was clear that the first two threshold criteria were met).

In this case, the court need not reach the core elements of timely notice, no prejudice, and good faith, because it is established federal law that the running of the limitations period is not tolled during the pendency of an internal grievance procedure. Delaware State College v. Ricks, 449 U.S. 250, 261, 101 S. Ct. 498, 506, 66 L. Ed. 2d 431 (1980); Fobbs, 29 F.3d at 1446 (rejecting tolling pending internal review process, pursuant to Delaware State College, despite

the fact that plaintiff had arguably met the three core elements). Equitable tolling is not warranted during the pendency of the State Personnel Board appeal and, thus, plaintiff's claim under Section 504 of the Rehabilitation Act is time-barred.[6/]

IT IS THEREFORE ORDERED that defendant's motion for summary judgment be, and the same hereby is, GRANTED.

DATED: August 27, 1999

/s/
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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6. The court does not reach the more complicated question of whether the running of the limitations period applicable to the Rehabilitation Act claim should be equitably tolled during the pendency of the EEOC investigation, because the Rehabilitation Act claim was already time-barred by April 18, 1997, the date plaintiff filed his charge of discrimination with the EEOC.

[Filed August 27, 1999]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DOSSEY DOUGLAS,

Plaintiff,

v.

THE STATE OF CALIFORNIA DEPARTMENT OF YOUTH AUTHORITY,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
CIV. S-98-1281 WBS PAN

XX – Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 8/27/99.

Jack L. Wagner,
Clerk of the Court

ENTERED: August 27, 1999

by: /s/
C HUTCHISON,
Deputy Clerk